SEP 28 1956
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.
No. 461

MICHAEL GLENN, a minor, by and through his Guardian *ad Litem*, IDA MAE GLENN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

JEROME L. YESKO,
64 Hamilton Street,
Paterson 1, New Jersey,
Attorney for Petitioner.

SAMUEL A. ROSENTHAL,
NORMAN WARREN ALSCHULER, and
LEONARD G. RATNER,
Of the California Bar,
215 West Seventh Street,
Los Angeles 14, California,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Michael Glenn, a minor, through his Guardian *ad Litem,* Ida Mae Glenn, appellee in the court below, respectfully petitions the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled action.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 231 F. 2d 392.

The opinion of the District Court for the Southern District of California is reported at 129 Fed. Supp. 914.

Grounds for Jurisdiction.

(1) The judgment of the Court of Appeals for the Ninth Circuit was made and entered on March 20, 1956.

(2) Appellee's petition for rehearing, filed within thirty days thereafter, was denied on May 25, 1956.

(3) Application for Extension of Time Within Which to File Petition for Writ of Certiorari was filed by Petitioner with this Court on August 23, 1956, and Order Extending Time to File Petition for Writ of Certiorari to October 8, 1956 was made by Honorable Harold H. Burton, Associate Justice, on August 23, 1956.

(4) Jurisdiction of this Court to review by Certiorari the judgment of the Court below is conferred by 26 U. S. C. 1254 (1).

Question Presented.

The Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been but should be settled by the Court, namely:

> Should the two-year statute of limitations for asserting tort claims against the United States be tolled during the legal disability of the plaintiff.

The United States District Court for the Southern District of California held the two-year period of limitations was tolled during the disability (infancy) of the plaintiff herein. The Court of Appeals, by a divided court, reversed.

Statute Involved.

28 U. S. C. 2401:

"Time for commencing action against the United States.

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1.000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

Statement of the Case.

Michael Glenn was born on December 5, 1949 at the United States Naval Air Station Hospital, Seattle, Washington, the son of a serviceman. The doctors, nurses and attendants attending and caring for him and his mother were employees of the United States acting within the

course and scope of their employment. [R. 52-6.] On November 12, 1953 said minor, by his mother as Guardian *ad Litem*, sued the United States under the Federal Tort Claims Act, alleging that through the negligence and carelessness of the doctors, nurses and attendants attending and caring for him Michael had been dropped on his head at the time of his birth and as a consequence had suffered serious permanent injuries. [R. 3-8, 17-23.] The United States denied that Michael had been dropped and that any negligence had occurred. [R. 27-28.] After extensive investigation by both parties, plaintiff and defendant, with the consent and approval of the trial court, entered into a stipulation that plaintiff should have judgment for $7500 subject to the right of defendant to assert the defense of the statute of limitations to said action and to appeal from any adverse decision of the trial court on that issue. [R. 52-56.]

Defendant's motion to dismiss on the grounds the action, having been brought almost four years after the claim arose, was barred by 28 U. S. C. 2401(b), was denied by the trial court, which made findings of fact and conclusions of law that the action was not barred by 28 U. S. C. 2401(b), [R. 72-74] and entered judgment for plaintiff in the amount of $7500 [R. 75-6] accompanied by a Memorandum of Decision [R. 58-71.] Defendant appealed to the Court of Appeals which reversed on the grounds the action was barred by 28 U. S. C. 2401(b), one judge dissenting.

Jurisdiction of District Court.

The jurisdiction of the District Court to hear and decide the within case was based upon 28 U. S. C. 1346(b).

ARGUMENT.

The present case presents an important question of federal law which has not been but should be decided by this Court. The majority opinion of the Court of Appeals does not fully or adequately consider the issues raised by the question presented, which issues were presented at length in Appellee's Brief and are set forth and discussed below.

I.

Section 2401 Provides That the Time Limitations on All Actions Against the Government Are Tolled During Legal Disability.

A. A provision for tolling the statute of limitations in actions against the government during the legal disability of the claimant was initially contained in 28 U. S. C. (1946 ed.) 41(20), derived from section 24(20) of the Judiciary Act of 1911, 36 Stat. 1093, and section 2 of the Tucker Act (1887), 24 Stat. 505. This section set forth a general six-year period of limitation for suits against the government, subject to the provision that said period of limitations was tolled during the disability of married women, minors, persons of unsound mind, and persons beyond the seas, and for a period of three years after the disability ceased. At the time of this enactment no tort claims were permitted against the United States, and the statute therefore, in express terms, applied only to contract actions against the government.

B. In 1946 Congress passed the Federal Tort Claims Act (Legislative Reorganization Act, Title IV, 60 Stat. 842) permitting tort claims against the Government, and provided therein a "statute of limitations" of one year for the assertion of such claims. (28 U. S. C. (1946 Ed.)

942). No express reference was made in said legislation to the matter of tolling the period of limitations during legal disability, although the statute did provide that the United States should be liable "in the same manner and to the same extent as a private individual under like circumstances." (28 U. S. C. 2674.) We do not know why an express provision for tolling the statute during legal disability was not included in the Act. Presumably Congress assumed that such a fundamental principle of fairness, deeply inbedded in Anglo-American jurisprudence (see *Sims v. Everhardt*, 102 U. S. 300, 309-310), would be given effect by the courts. (See argument under II, *infra.)* Nor do we know what sentiment arose in Congress during the two years following enactment of the statute for express inclusion of such a provision therein.

C. We do know, however, that as part of a general revision of the Judicial Code in 1948 Congress repealed both section 41(20) and section 942 of Title 28 of the United States Code and enacted a single new section, 28 U. S. C. 2401, which sets forth the time limitations for bringing actions against the Government and provides for the tolling of such time limitations during periods of legal disability of the claimant. This new section does not consist merely of the old sections 41(20) and 942 placed together in one location. On the contrary, section 2401 contains new language which differs in material respects from the language of the old sections. Subsection (a) of the new section provides for a general six-year statute of limitations on all actions brought against the government, without restrictions as to the type of action, whether contract or tort, and said subsection further provides that persons under a legal disability may assert

their action within three years after the disability ceases —again without restriction as to the type of action, whether contract or tort. Subsection (b) of the new section provides a two-year period of limitations for filing suit on tort claims exceeding $1,000 and for making written claim to the appropriate federal agency on tort claims not exceeding $1,000. (In 1949 the section was amended to increase the period of limitations on tort claims from one year to two years. (63 Stats. 62.))

D. Did Congress by the enactment of this new section make express provision for tolling the statute of limitations in favor of persons under a legal disability as to *all* actions against the government, both contract and tort? The meaning of the language of the section indicates this was done, and of course "the words by which the legislature undertook to give expression to its wishes" offer the best evidence of what was intended by the enactment. *(United States v. American Trucking Ass'ns,* 310 U. S. 534, 543-544.)

(1) The second sentence of subsection (a) of 2401 provides that *"the action* of *any person* under legal disability or beyond the seas at the time *the claim* accrues may be commenced within three years after the disability ceases." (Emphasis added.) Nothing in this sentence or in the sentence which precedes it limits its application to contract actions. The plain meaning of the sentence is that it applies to *all* actions against the government whether contract or tort. This conclusion is reinforced by the fact that the phraseology of the old section 41(20), which did expressly limit the application of its disability provision to contract actions, was abandoned in the drafting of the new section, so that the provision as to disability in the new section refers to "the action

of any person" without restriction as to the type or category of the action.

(2) Nor should the application of the disability provision in the new section be confined to contract actions because the provision is placed in subsection (a) of 2401 while the period of limitation as to tort claims is covered in subsection (b). Whatever the source of subsection (a) it is not, according to its terms, confined to contract actions. The first sentence of said subsection provides that *"Every civil action* commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." (Emphasis added.) "Every civil action" means every action, contract or tort. In this respect also the language of the section is materially different from the old section 41(20) which confined the six-year period of limitations to contract actions brought pursuant to that section.

Thus, subsection (a) of the new section provides for a general period of limitations on all actions against the government, contract or tort, of six years, and for a tolling of the limitation period *on all actions* in favor of persons under a legal disability until three years after the disability has been removed. Subsection (b) then specifically provides a shorter period of limitations for tort claims against the government, thereby setting up an exception to the general six-year limitation period of subsection (a). There is nothing, however, in the exception contained in subsection (b) which states in any way that the disability provision in the second sentence of subsection (a) does not apply to tort claims, and as an exception, subsection (b) should be limited to its terms. It must be kept in mind that these two subsections are merely paragraphs of a single section, enacted under a single

heading, and said section and each part thereof should be construed and given effect as a unit, in preference to treating each subsection as a separate and distinct section, complete in itself, as the Court of Appeals in effect does.

(3) Thus it appears that reasonably interpreted the language of section 2401 says in effect: There is a general six-year statute of limitations on all actions, contract or tort, brought against the government; the period of limitations on all actions, contract or tort, is tolled in favor of a person under a legal disability until 3 years after the disability is removed; provided, however, that as to tort claims asserted against the government the period of limitations shall be two years.

(4) This reasonable construction of the plain language of the statute is not contradicted by the Reviser's Notes. (28 U. S. C. A. foll. 2401.) These notes in effect simply point out the changes in language which have been made in section 2401 as compared to the old sections 41(20) and 942. In referring to such change of language, moreover, the Notes in two instances state "See Reviser's Note under section 2501 of this title." Section 2501 contains similar provisions with regard to the period of limitations on actions brought in the Court of Claims, and the Reviser's Notes under that section state in part:

> "The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic, and is eliminated by use of the general language substituted.
>
> "Words 'nor shall any of the said disabilities operate cumulatively' were omitted, in view of the elimination of the reference to specific disabilities. *Also, persons under legal disability could not sue, and their suits should not be barred until they become able to sue.*" (28 U. S. C. A. foll. 2405. Emphasis added.)

This quotation from the Reviser's Notes clearly enunciates a policy that suits by all persons not able to sue because of a legal disability should not be barred until they become able to sue. Since the Notes under section 2401 make specific reference to this statement, it appears that the same policy motivated the enactment of section 2401 and that section should be interpreted accordingly.

(5) It has been argued by defendant that if the disability provision of section 2401 is held to apply to tort claims a claimant under a legal disability will be given a longer period after the removal of the disability in which to bring suit (3 years) than the initial period of limitations on tort actions (2 years). This is not sufficient grounds, however, for disregarding the express language of the section. The explanation would appear to be simply that Congress chose to utilize the same general disability clause for all actions, contract and tort. The omission to provide that the period of limitations should end two years after the removal of the disability with respect to tort actions may have been an oversight on the part of the drafters or it may reflect a policy of giving persons under a disability a somewhat longer period in which to bring their case after removal of the disability, but whatever the explanation the express provision of the statute should control.

II.

The Time Limitation of Section 2401(b) Is a "Statute of Limitations" Which Under Federal Law Is Tolled During Legal Disability.

A. The Federal Courts in a number of cases have held that statutes of limitations are ordinarily tolled during the time plaintiff is prevented from suing because of legal disability or fraud of the defendant, even in the absence of express provision to this effect. The same cases further hold, however, that if the time limit for bringing suit constitutes a "substantive condition" of the right created by the statute in which it is set forth, rather than a "statute of limitations," then suit must be brought within that time period without regard to legal disabilities or fraud. (*Sgambati v. United States*, 172 F. 2d 297; *Osbourne v. United States*, 164 F. 2d 767, 768; *Wahlgren v. Standard Oil Company*, 42 Fed. Supp. 992; *Kalil v. United States*, 107 Fed. Supp. 966; *Frabutt v. New York C. & St. L. R. Co.*, 84 Fed. Supp. 460; *Damiano v. Penn. R. Co.*, 161 F. 2d 534. See *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253.) These cases include actions brought against the United States Government.

1. As indicated by the above cases a statute of limitations must be differentiated from a statute in which the time fixed for bringing the action is treated as an inherent part of the right created by the statute. As stated in 34 *Am. Jur.* 16:

> "A statute of limitations should be differentiated from conditions which are annexed to a right of

> action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unkown to the common law, and fixes the time within which that action may be commenced, *is not a statute of limitations.* It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right."
>
> (Emphasis added.)

In the above cited cases the time periods for bringing suit under the Federal Employers Liability Act and related statutes, to wit, the Jones Act, the Suits in Admiralty Act, the Public Vessels Act, were held to constitute, *not Statutes of limitations* which would be tolled during legal disability or for fraud, but substantive conditions to the exercise of the rights created by the statutes, which are not affected by legal disabilities or fraud.

B. As distinguished from the Federal Employers Liability Act and related acts, referred to above, however, the period of limitations set forth in the Federal Tort Claims Act is a *statute of limitations* rather than a substantive condition. The time limitation provision of the Tort Claims Act when enacted was expressly entitled by its codifiers "Statute of Limitations" (28 U. S. C., 1946 ed., 942), and it has been designated a statute of limitations rather than a substantive condition in *Sweet v. United States,* 71 Fed. Supp. 863, 864, and in *Maryland to the use of Burkhardt v. United States,* 165 F. 2d 869, at 873, wherein the court stated (p. 873):

> "As was well said by Judge Yankwich in *Sweet v. United States,* D. C., 71 F. Supp. 863, 864, answer-

ing the argument that the language of 410 (a) of the act incorporated the one year limitation on actions for tort of the California law: 'The sovereign having waived immunity, this clause, without anything else, might possibly be construed to mean that the state statute would apply. But the Congress specifically enacted section 420, 28 U. S. C. A. sec. 942, which the codifiers entitled *"Statute of Limitations."* ' . . . And we think it makes no difference that the limitation applicable to the action for death by wrongful act is held under state law to be a condition on the exercise of the right rather than a limitation on the remedy. This holding is based upon the narrow ground that the limitation is imposed by the statute creating the cause of action[2] and is, to say the best of it, technical and legalistic reasoning, which is not followed in all the states. ([2]It may be observed that the limitations in the Tort Claims Act is also imposed by the statute creating the cause of action; and *if importance is to be attached to this distinction*, it is a reasonable assumption that Congress intended the condition created by its own act to apply rather than one relating to the same subject matter contained in the State law.)" (Emphasis added.)

Thus, under the federal cases the Federal Tort Claims Act is to be differentiated from the Federal Employers Liability Act and related acts in that the time for bringing suit under the former is a statute of limitations and the time for bringing suit under the latter is a substantive condition. Therefore, the period of limitations is tolled during legal disability under the Tort Claims Act but not under the other acts named.

C. An important reason for this distinction between the Federal Tort Claims Act and the Federal Employers Liability Act and related statutes is indicated in the cases

cited above holding the time limitations of the latter acts are substantive conditions rather than statutes of limitations. These cases state as a basis for their holdings that said statutes created new rights unknown to the common law. This, however, is not true of the Federal Tort Claims Act. The substantive right made available to plaintiffs by that act is simply the old common law right of action for negligence. True, the sovereign could not be sued for negligence at common law, but this freedom from suit was merely an immunity on the part of the sovereign constituting a defense to the common law action. The common law right of suit for negligence continued to exist subject to a defense of immunity on the part of the sovereign. This defense could be waived by the sovereign and has in fact been waived by the United States through the Federal Tort Claims Act *(Cerri v. United States,* 80 Fed. Supp. 831 at 833; *Sweet v. United States,* 71 Fed. Supp. 863, 864), thereby leaving plaintiffs free to assert their basic common law cause of action. The Tort Claims Act does not create a new kind of action; it does not create a cause of action at all; it merely waives the government's defense of immunity to suit.

1. That the basic cause of action under the Tort Claims Act is a common law cause of action is made clear by the provision of the act that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." (28 U. S. C. 2674.) This clause, of course, does not mean that the statute of limitations of the State wherein the tort occurred is to apply to suits brought pursuant to the act, and in fact the courts have expressly held that the clause does not have that effect

(Maryland v. United States, 165 F. 2d 869; *Sweet v. United States,* 71 Fed. Supp. 864), but the clause does indicate that the cause of action which a plaintiff asserts against the government under the Tort Claims Act is simply the same common law cause of action that is asserted against private persons. *(United States v. Campbell,* 172 F. 2d 500 at 503; *Cerri v. United States,* 80 Fed. Supp. 831 at 833.)

D. Serious doubt has been cast upon the entire doctrine that the time limitations contained in the Federal Employers Liability Act and related statutes are unaffected by legal disability or fraud, and several exceptions have been made which are not consistent with the rule. *(Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253; *Osbourne v. United States,* 164 F. 2d 767; *Frabutt v. New York C. & St. L. R. Co.,* 84 Fed. Supp. 460; See *Maryland to the use of Burkhardt v. United States,* 165 F. 2d 869.)

1. In the *Scarborough* case the court held the time period of the Federal Employers Liability Act was suspended during the period that plaintiff was prevented from bringing suit by the fraud of the defendant. In the *Osbourne* and *Frabutt* cases the court held the time limitations was suspended during the period that plaintiff was prevented by war from bringing suit.

2. These exceptions to the rule and doubts as to its ultimate soundness have grown out of the extreme inequity of the doctrine, its technical nature, and the failure of the courts following it to give full and serious consideration to the logic and fairness of its application. As stated by the Court of Appeals for the 4th circuit in *Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253, at 258-259, in reversing the District Court which had refused to

suspend the time period of the Employers Liability Act during the period plaintiff was prevented from bringing suit by the fraud of the defendant:

> "We have endeavored to set out fairly the law with which we are here concerned, as it has been stated in the cases decided by the courts. If dicta be considered, the weight of such primary authority appears to favor the view expressed by the District Court. In none of these cases, does the opinion fairly face, with an adequate discussion of the question on principle, the precise problem now before us. The cases cited as favoring the appellee based their holdings on *the narrow technical distinction between the two types of statutes of limitations* and then state baldly that, by virtue of this legalistic distinction, fraud does not toll the running of a statute of limitations which is of the substantive type. Under these circumstances, we do not consider ourselves bound by this seeming weight of judicial authority. We accordingly, feel free to decide this case on principle. . . .
>
> "The decisions in the *Osbourne* and *Frabutt* cases, *supra,* show clearly that *there is a chink in the supposedly impregnable armor of the substantive time limitation of the Act. If, as those cases cited, there is one exception (war), surely the infinite variety of human experience will disclose others. Those cases demonstrate that a claim under the Act is not a legal child born with a life span of three years, whose life must then expire, absolutely, for all purposes and under all circumstances.* True it is that war physically prevents access to the courts, however anxious a litigant may be to bring suit. Fraud, however, as in the instant case, may be equally as effective in preventing one from seasonably suing on his claim. . . .
>
> "Judge Frank in the *Osbourne* case and Judge Parker in the *Burkhardt* case [*Maryland to the use of*

Burkhardt v. United States, 165 F. 2d 869], *supra,* have shown that *the distinction between a remedial statute of limitations and a substantive statute of limitations is by no means so rock-ribbed or so hard and fast as many writers and judges would have us believe.* Each type of statute, after all, still falls into the category of a statute of limitations. And this is none the less true even though we call a remedial statute a pure statute of limitations and then designate the substantive type as a condition of the very right of recovery. There is no inherent magic in these words." (Emphasis added.)

3. According to the above quotation the time period for bringing an action, whether it be a true statute of limitations or a substantive condition, should be suspended during the period that plaintiff is prevented from bringing suit without fault on his part. Surely infancy may offer as effective a bar to suit as fraud on the part of defendant or the exigencies of war. An infant is legally barred by reason of his infancy from bringing suit. Defendant has argued that the infant may sue by next of friend. But he may have no next of friend. The rule established by the Court of Appeals in this case will be applicable to all infants in all situations. It will apply to a new born baby whose parents are dead, to children of tender years who are abandoned, to children whose parents are too ignorant and uninformed to protect the rights of their children. It will apply also to insane persons without friends or kin confined in mental institutions. In such situations the person under disability is as effectively prevented from bringing suit as a person who is held a prisoner of war or who is misled by misrepresentations. To bar such persons permanently from bringing suit before termination

of their disability is discrimination so shocking that such an intention should not be attributed to Congress if it can reasonably be avoided.

4. In the present case the following facts are all undisputed: Plaintiff is a colored boy who suffered alleged injuries at the time of his birth, December 5, 1949, in a naval hospital in Seattle, Washington. [R. 18-20, 52, 54.] His father was in the armed forces at the time and shortly after plaintiff's birth was sent to Korea where he was killed in action. [R. 73.] His mother who was 22 years old at the time of his birth had attended school only through the seventh grade. [Deposition of Ida Mae Glenn, taken by defendant Nov. 22, 1954, pp. 3, 6.] Under these circumstances certainly it may be reasonably said that this boy could not effectively bring suit for his injuries within two years after the occurrence of the alleged injuries. The District Court expressly found the plaintiff is a person under a legal disability by reason of his minority [R. 73] and that his guardian is not barred from bringing the action by the two-year period of section 2401(b). [R. 74.] Under the principles enunciated in the *Scarborough* case the trial court at least should have discretion to find that, by reason of his extreme infancy and the other circumstances of the case, plaintiff was in effect prevented from bringing suit within the statutory period without fault on his part and that the period of limitations was therefore tolled. So long as it has a reasonable basis in fact this exercise of discretion should not be disturbed by an appellate court.

III.

Ambiguities and Omissions in the Opinion of the Court of Appeals.

A. It cannot be clearly determined from the majority opinion of the Court of Appeals what is the basis for the holding that the disability provisions of U. S. C. section 2401 does not apply to actions in tort against the government. The opinion states that "it is not clear that the sentence in (a) qualified the limitation on tort claims set forth in (b)" and that therefore other indications of Congressional intention must be looked to. The only indications of Congressional intention to which the opinion refers, however, are that "there is no presumption that by a revision which lifts two limitation clauses out of respective context, rewords them a little, and sets them down with separate sublettering in a separate limitations section that the whole of the two were intended to be commingled," that "there is no committee report and no Congressional colloquy or debate that sustains the position of plaintiff-appellee," and that "the reviser's notes which purported to pinpoint substantial changes in the judicial code are silent on any intent to have any tolling provision wash into the Federal Tort Claims Act." The sum and substance of these statements is that there is no substantial evidence of Congressional intention other than the statute itself. The court in effect says: "The meaning of the statute is not clear therefore we must look to other evidence of Congressional intent. There is little or no other evidence of Congressional intent, therefore we hold that the disability provision of subsection (a) does not apply to subsection (b)." This conclusion does not follow from the prior statements. In the absence of more definite evidence of Congressional intention, the Court must return to the language of the statute itself

and determine what is the proper interpretation of the actual language used. This the Court has expressly refused to do.

B. The opinion does not consider the fact that the new section 2401 does not consist merely of the old sections placed together in one location, but that on the contrary section 2401 contains new language which differs in material respects from the language of the old sections. In particular, the wording of subsection (a) of 2401 provides for tolling of the statute of limitations during disability on *all actions* brought against the government *whether contract or tort* as distinguished from the old section 4120 which applied only to contract actions.

C. The opinion does not give consideration to the fact that subdivisions (a) and (b) are but component parts of a single section which must be construed together as a unit rather than as if each subsection was a section separate unto itself.

D. The opinion does not consider the fact that the reviser's notes under section 2401 make specific reference to the notes under section 2501, which section contains similar provisions with regard to actions brought in the Court of Claims, and that the notes under section 2501 state in part: "The revised language will cover all legal disabilities actually barring suit . . . Also persons, under legal disability could not sue, and their suits should not be barred until they become able to sue," which statement offers specific evidence of a policy not to bar from suit persons under a disability.

E. The opinion does not consider in any way the meaning or effect upon the question presented of section 2674 which provides that "The United States shall be liable, respecting the provisions of this title relating to tort

claims, in the same manner and to the same extent as a private individual under like circumstances." Since the statute of limitations on tort claims against private individuals is ordinarily tolled during the disability of the plaintiff, this section indicates an intention on the part of Congress to have a similar policy apply with regard to the government.

F. Finally, the opinion does not discuss in any manner plaintiff's appellee's contention, set forth herein under II, that under the decisions of the Federal Courts, including cases against the government, a statute of limitations, as distinguished from a substantive condition, is ordinarily tolled during disability or fraud of the plaintiff, even in the absence of an express provision to this effect. In particular, the opinion gives no consideration to the case of *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253 at 258-9 holding that the period for bringing suit under the Federal Employers Liability Act is tolled by fraud even in the absence of an express provision to this effect and stating that the "infinite variety" of human experience would disclose other circumstances which would justify tolling the time limitation for bringing suit even in the absence of an express provision in the statute.

For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be granted.

JEROME L. YESKO,
Attorney for Petitioner.

SAMUEL A. ROSENTHAL,
NORMAN WARREN ALSCHULER, and
LEONARD G. RATNER,
Of the California Bar,
Of Counsel.